

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

HTR INC.,	§	
<i>Plaintiff,</i>	§	
	§	
vs.	§	CIVIL ACTION H-06-0835
	§	
CONTINENTAL GROUP, LLC,	§	
<i>et al.,</i>	§	
<i>Defendants.</i>	§	

**ORDER**

Pending in this business dispute are (1) defendant’s motion to dismiss for failure to join a necessary party (Dkt. 43); (2) plaintiff’s motion for leave to amend (Dkt. 56) and supplemental motion for leave to amend (Dkt. 66); (3) defendants’ motion to designate a responsible third party (Dkt. 55); (4) defendant’s motion to dismiss under Rules 9(b) and 12(b)(6) (Dkt. 60); and (5) the parties’ joint motion for a continuance (Dkt. 68). The court addresses the motions in turn.

**1. Defendant’s Motion to Dismiss for Failure to Join Necessary Party (Dkt. 43).**

Defendants seek dismissal for plaintiff’s failure to join Roger (“Skip”) Bradley as a defendant in this case. Bradley is not a necessary party who must be joined in this action under Federal Rule of Civil Procedure 19. It is ordered that defendants’ motion to dismiss (Dkt. 43) is denied.

**2. Plaintiff's Motion for Leave to Amend (Dkt. 56) and Supplemental Motion for Leave to Amend (Dkt. 66).**

Based on plaintiff's supplemental motion, the prior motion to amend (Dkt. 56) is denied as moot. Plaintiff's supplemental motion drops Mike Starling as an individual plaintiff, and dismisses plaintiff's tort claims. It does not add any new claims, but does clarify existing breach of contract, quantum meruit, implied contract, and promissory estoppel claims. Defendant will not be prejudiced by the amendment.<sup>1</sup> Plaintiff's supplemental motion to amend (Dkt. 66) is granted, and the Amended Complaint attached to docket 66 is plaintiff's operative pleading in this case.

**3. Defendants' Motion to Designate a Responsible Third Party (Dkt. 55).**

Defendants seek to designate Bradley a responsible third party pursuant to Texas Civil Practice and Remedies Code § 33.004. Section 33.004 is part of Texas's proportionate responsibility scheme for tort cases. Because plaintiff has dismissed all tort claims from this case, § 33.004 is not applicable. Defendant's motion to designate Bradley a responsible third party (Dkt. 55) is denied.

**4. Defendants' Motion to Dismiss (Dkt. 60).**

Defendants seek dismissal of this case under Federal Rule of Civil Procedure 9(b) because plaintiff did not pled fraud with particularity, and under Federal Rule of Civil Procedure 12(b)(6) because Texas law does not recognize a breach of duty of good faith in

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<sup>1</sup> At the time it was filed, defendants represented that they did not oppose plaintiff's motion for leave to amend (*see* Dkt. 56 at 9). The court refrained from ruling until new counsel appeared in the case.

ordinary contract cases, because plaintiff did not sufficiently plead causes of action for quantum meruit or implied contract, because plaintiff did not plead the statutory condition precedent of presentment for its attorneys' fees claim, and because plaintiff did have any basis for seeking exemplary damages.

Defendants' assertions of deficiency have been addressed by plaintiff's amended complaint. Plaintiff voluntarily dismissed its fraud and breach of duty claims, no longer seeks exemplary damages, and has added the necessary presentment allegations to support a claim for attorneys' fees. Plaintiff has also sufficiently alleged for pleading purposes alternative theories of recovery under quantum meruit or implied contract. *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005) (a party may seek alternative relief under both contract and quasi-contract theories). Defendants' motion to dismiss (Dkt. 60) is denied.


#### **5. Joint Motion for Continuance (Dkt. 68).**

This case is currently set court's trial docket for June 30, 2008, and the joint pre-trial order is due June 18, 2008. The parties request a continuance until September 2008 or as soon thereafter as possible.

Because this case recently was stayed for 60 days to afford plaintiff an opportunity to secure new counsel, there is good cause for reasonable continuance to give the parties adequate time to prepare for trial. The parties' motion for continuance (Dkt. 68) is granted. This case is set for a 2-day jury trial beginning on October 14, 2008 at 9:30 a.m. However,

court is concerned about the age of this case, filed in March 2006. Therefore, no future continuances will be granted barring exceptional circumstances.

Signed at Houston, Texas on June 4, 2008.

  
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Stephen Wm Smith  
United States Magistrate Judge